IN THE

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 39.

BALTIMORE SHIPBUILDING AND DRY DOCK COMPANY OF BALTIMORE CITY,

vs.

MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

The writ of error in this case presents to the Court the question as to whether or not certain lands, held by the plaintiff in error under a grant upon condition from the United States, are subject to taxation by the State of Maryland and the "Mayor and City Council of Baltimore" (the corporate title of the city of Baltimore), the contention of the plaintiff in error being that the lands are exempt for three reasons:

First. The United States have an interest in the lands, and therefore neither the lands nor any estate in them, short of an absolute usufructary title, held by any private party, is subject to taxation without the express consent of the United States, which, it is conceded, is wanting here.

Second. Under the peculiar conditions of the grant, the lands themselves constitute a "federal agency."

Third. The lands having been acquired by the United States from the owners, with the unrestricted consent of the Legislature of Maryland, they are deemed to have been ceded to the United States, which consequently are vested with full and exclusive jurisdiction and legislative power over them; and inasmuch as no act of recession has been done, the State of Maryland is wholly lacking in jurisdiction of any kind over them.

The lands in question are a part of the "Fort McHenry Tract," which was acquired and is held by the United States by virtue of certain conveyances (referred to in the Record at pages 18 and 19), for public purposes within the meaning of the Federal Constitution, article 1, section 8, paragraph 17, and with the express and unrestricted consent of the Legislature of the State of Maryland, contained in a joint resolution of the General Assembly, adopted at its November session, 1793. (See Record, page 19.) It may be also said that this whole tract of land is of considerable area; it lies at the end of a tongue of land between two of the branches or arms of the Patapsco river; and on it from early times have been the fortifications known as "Fort McHenry."

In order to procure the erection of a dry dock of considerable size on a portion of these lands, and to secure to the Government the perpetual use of such dock at all times free of charge, Congress passed an act, approved June 19, 1878, and entitled "An Act Granting a Site for a Dry Dock in the City of Baltimore upon Certain Conditions," the material parts of which are:

1. "That the Secretary of War be, and he is hereby, directed to convey to the Baltimore Dry Dock Company of Baltimore City, a body corporate, created under the laws of the State of Maryland, for the consideration hereinafter described, so much of the land belonging to the United States in said city, known as the "Fort McHenry Tract," as lies within certain prescribed boundaries.

2. "That in consideration of the said conveyance, and as the condition upon which the same is made, the said Dry Dock Company shall be required to construct, upon the land conveyed as aforesaid, an efficient 'Simpson's Improved Dry Dock,' four hundred and fifty feet in length, and to accord to the United States the right to the use forever of the said dry dock, at any time, for the prompt examination and repair of vessels belonging to the United States, free from charge for docking; and if at any time said property shall be diverted to any other use than herein named, or if said dry dock shall be at any time unfit for use for a period of six months, or more, the property hereby conveyed with all its privileges and appurtenances, shall revert to and become the absolute property of the United States." (Record, pages 17 and 18.)

Subsequently, on March 26, 1879, the Honorable George W. McCrary, Secretary of War, made and executed a deed for the property described in the Act, to the plaintiff in error, upon the conditions in the Act set forth (Record, page 15), and within two years, the time limited by the Act, the plaintiff in error entered on the lands and constructed a dry dock of the prescribed style and size, which it has since maintained in such condition that the dry dock has never been unfit for use for a period of six months, or more, the land has never been diverted to any other use than that named in the Act, and the United States have had the use of the dry dock for the prompt examination and repair of vessels belonging to the United States, free from charge for docking, whenever required.

From the date of the deed from the Secretary of War, March 6, 1879, to September 24, 1902—more than twenty-three years—no attempt was made by the State of Maryland and city of Baltimore to assess these lands, or the estate of the plaintiff in error in them, for taxation. But on the last mentioned date the plaintiff in error was notified by the Appeal Tax Court of Baltimore City, the board of assessors of said city, of its intention to make an assessment on these lands for taxes for the year 1903. (Record, page 21.) Against this proposed assessment the plaintiff in error protested both on the ground of its illegality and with respect to its excessive amount, and upon final action being taken by the Appeal Tax Court, affirming its preliminary notice, the plaintiff in error promptly presented its petition of appeal to the Baltimore City Court, according to the provisions of the Statute. (Baltimore City Charter, sec. 170.) Omitting reference to so much of the proceedings in the State Courts as had to do with the quantum of the assessment, which of course is not reviewable by this Court, it may be said that the plaintiff in error objected to the assessment and taxation of these lands before the Appeal Tax Court and before the Baltimore City Court, upon precisely the same grounds upon which it is seeking to maintain its position before this Court, being the grounds hereinbefore set forth. (Record, page 7 *et seq.* and 20 *et seq.*)

It need scarcely be remarked that all of them present "Federal Questions," within the strictest definition of those words, in that they all have to do with a right, title, privilege or immunity claimed under an Act of Congress. (U. S. Rev. Stat., sec 709.)

The following facts need also to be noticed:

1. The assessment of the Appeal Tax Court was made upon the lands, as such, and not upon the interest or estate of the plaintiff in error in them. (Record, page 20, top; page 21, bottom; page 24, middle.)

2. The Baltimore City Court, by its order of January 6, 1903, also laid its assessment on the lands themselves. (Record, page 23.)

3. The assessment in question is laid upon the lands and certain permanent improvements, such as piers, but not upon the buildings, dry dock and other like improvements thereon. (Record, page 20.)

An appeal was taken from the order of the Baltimore City Court, affirming the action of the Appeal Tax Court in making the assessment on the lands, to the Court of Appeals of Maryland, the State Court of last resort, which by its final judgment, entered April 2, 1903, affirmed the judgment of the lower Court (the final judgment of the State Court of last resort being therefore adverse to the right, title, privilege or immunity set up under the Act of Congress). On April 22, 1903, application was made to the Hon. James McSherry, Chief Judge of the Court of Appeals of Maryland, for a writ of error from this Court to review the judgment of the Court of Appeals, which was thereupon allowed and sued out in due form of law. (Record, pages 1, etc.)

Assignment of Errors.

Upon this state of facts, the plaintiff in error contends that the final judgment of the Court of Appeals of Maryland, affirming the ruling of the Baltimore City Court, was erroneous for the following reasons:

First. The assessment complained of is an assessment on land, in which the United States have an interest, right or title, and neither the State of Maryland or any municipal corporation, created by it, has power to lay such an assessment or to tax any such land.

Second. If it be contended that the assessment is merely upon the interest or estate of the plaintiff in error in the land, it is none the less void, because, we maintain, neither the State of Maryland nor any of its agencies has power to tax any estate in land, in which the United States also have

an interest or estate, except the United States be the mere custodian of the dry legal title and the whole usufructary right to the lands be vested in another, or except the United States expressly consent to the taxation of such other interest or estate, neither of which contingencies is presented here.

Third. Under the peculiar terms and conditions of the grant in question here, the land has not ceased to be put to a public use by the grant of it to the plaintiff in error, but on the contrary, it, *i. e.* the land, *not the plaintiff in error*, constitutes an agency of the Federal Government, used by it in the exercise of its constitutional powers, and hence is not subject to State taxation.

Fourth. The land having been purchased by the consent of the Legislature of the State of Maryland for the public purposes within the meaning of the Constitution, Art. 1, sec. 8, clause 17, Congress has power to exercise exclusive legislation in all cases over them, and there being no act of express or implied recession of said lands by Congress, the State of Maryland has no power or jurisdiction over them in any case whatsoever, except as expressly allowed by Congress, and, *a fortiori*, has no power to tax said lands or any interest or estate therein. (Record, pages 4 and 5.)

THE LAW.

I.

Before coming to the main questions to be decided by the Court, we may be pardoned, if, even at the risk of pointing out the obvious, we discuss certain preliminary questions, particularly, the nature of the respective interests of the Federal Government and of the plaintiff in error in land granted on these extraordinary terms to the plaintiff in error by Congress.

A. Congress authorized the conveyance of this land to the plaintiff in error upon several conditions, one precedent in its nature, the others subsequent, or, as one might say,

continuing. The condition precedent was that a dry dock of a certain prescribed kind and size should be built upon the land within two years from the date of the conveyance, which was done. The other conditions are:

1. That the United States shall have the perpetual use of the dry dock, so constructed, for the prompt examination and repair of vessels, belonging to them, free of charge for docking.

2. That the property shall never be diverted to any other use than that named in the Act. And

3. That the dry dock shall never be permitted to be unfit for use for a period of six months, or more.

Upon the happening of any one of these contingencies, the property conveyed, with all its privileges and appurtenances, shall revert to and become the absolute property of the United States, thereby destroying any possible right of State taxation.

We must presume, therefore, and, in fact, the defendants in error are estopped to deny, that the dry dock of the specified kind was erected and has been maintained, that the land has not been diverted to any other use than the construction and maintenance of said dock and other uses, incidental thereto or connected therewith, and that the United States, whenever required, have always had the free and prompt use of this dry dock for the proper purposes of vessels belonging to the various branches of the governmental service. It may also be remarked that although it is the potential right of the United States with which we have to do, it is a matter of fact that the government does make use of the dry dock, and, *non constat*, that it might make constant use of it to such an extent as to deprive the plaintiff in error of any right to let it to any other party, and so as to amount to a practical confiscation of it for the time being —a condition of things which can be easily imagined in case of a war of magnitude, or other great public crisis.

The Court of Appeals of Maryland described the legal aspects of the respective interests of the United States and of the plaintiff in error in the lands, in the following words, (Record, page 26): "The appellant holds that lot under a conditional grant from the United States as a site for a dry dock;" and again (Record, page 28): "Under this conveyance, *i. e.*, the deed from the (Secretary of War), the appellant did not acquire the absolute fee simple title to the land, but took only an estate therein limited to a particular use under special conditions and liable to be defeated upon a misuser or non-user. * * *"

But we think, however, a more accurate description of thes estates and their incidents, so far at least as they need to be considered here, is to be found in the recent and somewhat similar case of—

Northern Pac. Rw. Co. vs. Townsend, 190 U. S. 267.

That case involved the question as to whether lands granted by Congress to the Northern Pacific Railway Company for a right of way were subject to acquisition of title by adverse possession for the period required by the statute of the State in which they lie. In describing the nature of the title of the railway company, Mr. Justice White, speaking for the Court, said at page 271:

"Manifestly, the land forming the right-of-way was not granted with the intent that it might be absolutely disposed of at the volition of the Company. On the contrary, the grant was explicitly stated to be for a designated purpose—one which negatived the existence of power to voluntarily alienate the right-of-way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was a limited fee,

made on an implied condition of reverter in the event that the Company ceased to use or retain the land for the purpose for which it was granted."

It will be at once observed that one superficial difference between the nature of the Railway Company's title there and the title of the Dry Dock Company to the lands in question exists in the fact that in this case the right of reverter absolute is expressly set forth in the grant. But on looking at the two cases more closely this apparent dissimilarity disappears, and we submit that there is no part of the Court's description of the Railway Company's title which is not equally applicable to that of the Dry Dock Company here.

Applying the rule of that decision here, but bearing in mind that by virtue of the perpetual right of free user of the dry dock, there exists an added element of governmental interest, we submit that it cannot be gainsaid, that by the acceptance of the conveyance and the conditions upon which it was made, which acceptance is necessarily implied from entering into possession of the land under the grant, the plaintiff in error became possessed of an estate in this land very different in its nature and incidents from any in which the government and governmental rights and obligations are not involved, that it thereby undertook certain duties and obligations to the United States, and that Congress manifested its intention that title to and possession of this land by the plaintiff in error are necessary to the proper discharge of these duties and obligations. Consequently, it cannot be permitted that this title and possession should be interfered with or obstructed by any other power or authority, or that the plaintiff in error should be stripped of that title and possession, save by the United States,—and then only for failure to observe and perform those duties and obligations.

It, therefore, becomes apparent, we submit, that a more accurate definition of the estate of the United States in this land may be said to be "a right of reverter absolute, subject

to the performance of certain continuing conditions for the sole benefit of the reversioner, and conferring upon the reversioner certain valuable present rights of user in the land itself." But whether we be right in this definition or not, *the fact remains that* the United States have rights in the land, of a kind absolutely essential to the performance of its national functions, coupled with a right of reverter in case those rights are denied, obstructed or abridged at any time.

B. It is also to be premised that these interests or estates of the United States and of the plaintiff in error both constitute "property" in one sense of that word. They are clearly not "property" in the sense of things material, as land itself or a horse is. But they are "property" according to the more usual legal meaning of "a right or interest which a man has in lands and chattels to the exclusion of others," in which sense it embraces every species of valuable right and interest in things material. In a word, "property" may be the land or thing itself, or it may be a right, absolute or qualified, in the land or thing.

Austin's Jurisprudence (Campbell's notes), vol. 2, sec. 1051.

Bouvier's Law Dict. (1897), "Property," vol. 2, page 780.

Anderson's Law Dict. (1889), "Property," page 835.

As Mr. Austin points out, the word "property" has still other meanings, as, for instance, a "right of property" as contradistinguished from "a right of possession," all equally well accepted in legal nomenclature; and we shall hereafter endeavor with all respect to point out, that the learned Courts of the State of Maryland have been misled in their decisions of this case by the ambiguity that is necessarily liable to arise from the manifold use of this word.

C. It is sufficient at this time to say that all "property" is not of necessity taxed by the State of Maryland. It has uniformly been held that the provision of the Maryland Declaration of Rights, Art. 1, Sec. 15, "but every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property," was not violated by certain express exemptions.

Buchanan vs. County Commissioners, 47 Md. 286.

And, too, it has been held by the Maryland Courts that certain classes of "property" and rights, highly valuable in themselves, are not the subject of taxation at all, and also that there is "property," which though taxable in its nature, does not fall within the true meaning of the tax laws of the State, as they now stand, thereby constituting what may be termed, for want of a better definition, "implied exemptions."

Baltimore City vs. Johnson, 96 Md. 737, particularly at pages 746 and 747.

Another case to the same point was the case of The President, etc., of the Balto. and Frederick Turnpike Co. vs. The Appeal Tax Court, decided by Chief Judge H. D. Harlan, of the Baltimore City Bench, on May 6, 1903, the opinion being published in the Baltimore Daily Record of May 7, 1903. The case involved the right of the Appeal Tax Court to assess for taxation the easement or right-of-way of the Turnpike Company within the limits of Baltimore city, and though it indirectly involved the right to tax the easements of all the public service corporations of Baltimore, no appeal was taken from Judge Harlan's decision, holding the right-of-way exempt under the existing tax laws. The learned Judge, after pointing out that the statute made provision for the taxation of "all real properties in this State belonging to any corporation incorporated by or under the laws of this State," and various other provisions of the law applicable to the question before him, particularly one section (Art. 81,

Sec. 178), whereby it is provided that "Assessors shall personally inspect all real estate in their respective districts," concludes, "Intangible, incorporeal things are not capable of inspection. The property, which is subject to the easement can be seen, but the easement—the right—exists only in contemplation of law and can not be seen or inspected. All freehold estates are real property, *but we know that what is assessed is the corporeal property in which the estate exists*, and that there never has been any practice in this State to value to their respective owners for purposes of taxation, the several estates in the property where there are such.

"In Appeal Tax Court vs. Western Md. R. R. Co. et al., 50 Md. 301–2, the Court of Appeals said 'that an easement enjoyed in the bed of a public street may be assessed and taxed as real estate,' but as has been heretofore pointed out in this opinion, the question here is not whether this may be done, but whether the Legislature meant it to be done under the words of section 141."

In a word, there are some classes of "property" where the power to tax is wholly wanting, and there are others, for the taxation of which no provision has been made by the Legislature, though it possesses the power.

Consequently, it does not of necessity follow that the land in question, or the interest of the plaintiff in error therein, is subject to assessment and taxation. We shall endeavor to show that the land itself, as such, has been in fact assessed, and that this assessment is necessarily void, because it constitutes an attempt to tax the property of the United States; but we shall also contend that, even if this be an assessment upon the interest or estate of the plaintiff in error in the land, it is none the less void, not because it, this estate, is not "property," but because, even if such an estate standing alone constitutes "property," for the taxation of which provision is made by the Statutes of Maryland, and does not fall within the class of "implied exceptions," above mentioned, nevertheless such an assessment

and attempt at taxation would be inoperative in this case, by reason of the fact that the United States also have an interest in this land, and hence no other estate in the land may be taxed without the consent of Congress. Such property (meaning thereby corporeal property) is, we contend, withdrawn from the body of taxable property of the State so long as the United States has any such interest.

II.

The State of Maryland has no Power to Tax the Property of the United States, Including Land in which the United States have an Interest or Estate.

This principle of law is now so fundamentally established in our system that it may be said to be axiomatic. It is provided by Maryland Code of Public General Laws,

> Title, "Revenue and Taxes," sub-title, "Exemptions," Art. 81, Sec. 4, (as amended by Act of 1897, Ch. 120):

"The provisions of this article shall not apply to any bonds or stocks or evidence of indebtedness issued by the United States belonging to any residents of this State, nor to any property in this State belonging to the United States" * * *

This is but legislative recognition of a fundamental doctrine of our law.

> Black on Tax Titles, (1893,) sec. 35, etc.
> Cooley on Taxation (3d Ed.,) 135-139.
> Howell vs. State, 3 Gill, 14.
> McCulloh vs. Maryland, 4 Wheaton, 316.
> Van Brocklin vs. Tennessee, 117 U. S. 151.
> Wisconsin Cent. R. R. Co. vs. Price Co. 133 U. S. 496.

In the last mentioned case Mr. Justice Field, speaking for the Court, said at page 504:

"It is familiar law that a State has no power to tax the property of the United States within its limits. This exemption of their property from State taxation—and by State taxation we mean taxation by authority of the State, whether it be strictly for state purposes or for mere local and special objects—is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its power or impair their efficiency. If the property of the United States could be subjected to taxation by the State the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the discharge of the ordinary business of the National government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States. The constitution vests in Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. And this implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise. Van Brocklin vs. Tennessee, 117 U. S. 151, 168."

It is equally familiar that this doctrine is applicable not only in cases where the United States are vested with full legal and equitable title to the property sought to be taxed, but to all cases of lands in which the United States have any real interest, and it fails to apply only in cases when the United States may be vested with the mere dry legal title, full beneficial or equitable ownership and title being vested in others, as in—

Carroll vs. Safford, 3 Howard, 441.
Witherspoon vs. Duncan, 4 Wall. 210, and other cases hereinafter referred to.

Judge Cooley in his elementary work on the Principles of Constitutional Law, at page 60, declares succinctly: "Land

of the United States lying within a State is not taxable by the State. If such land has been bought or taken up by an individual, it is not subject to State taxation, so long as something remains to be done by the individual to perfect his right to a patent from the United States."

And examples of this rule may be found in the following cases:

Kansas Pac. Rw. Co. vs. Prescott, 16 Wall. 603.
Union Pac. R. R. Co. vs. McShane, 22 Wall. 444.
Tucker vs. Ferguson, 22 Wall. 527.
Forbes vs. Gracey, 94 U. S. 762.
Colorado Co. vs. Commissioners, 95 U. S. 289.
Northern Pac. Rw. Co. vs. Traill Co., 115 U. S. 600.
Van Brocklin vs. Tenn., *supra*.
Wisconsin Cent. R. R. Co. vs. Price Co., *supra*.

Therefore, we submit, if the fact be as we have stated, namely, that the assessment in this case is laid upon the land, it is, *a fortiori*, laid upon the interest of the United States, its "property," and is, therefore, void.

III.

The Assessment in this Case is Laid Upon the Land, as Such, and not Upon the Interest of the Plaintiff in Error Therein.

On the *facts*, as disclosed by the record, there can be, we think, no doubt whatsoever that the assessment complained of is an assessment on the land itself. As we shall point out, the original assessment itself was so made by the Appeal Tax Court, and, as the Court of Appeals itself states (if indeed such testimony be needed), the Baltimore City Court "confirmed" the action of the Appeal Tax Court, while it is, of course, patent that the judgment of the Court of Appeals in terms "affirmed" the order of the Baltimore City Court.

But, as we shall call to the Court's attention later, the opinion of the Court of Appeals, which, be it said, is no part of its judgment or decree, does undoubtedly also state that this assessment is upon the interest of the plaintiff in error in the land, and it therefore becomes necessary to inquire what the manner and nature of the assessment was.

A. It is worthy of notice that the Court of Appeals also said, in the opening sentence of its opinion (Record, page 26): "This is an appeal from an order of the Baltimore City City Court, confirming the action of the Appeal Tax Court *in assessing for taxation the lot of ground* and dry dock of the appellant situated at Locust Point in said city," which statement contains within itself two propositions of fact:

1. The original assessment made by the Appeal Tax Court was upon the land.

2. This assessment was confirmed by the Baltimore City Court.

In both respects, the Court of Appeals is absolutely accurate. The Record shows beyond the possibility of contention, that the original assessment was upon the land, as such.

The first notice of the intention to make any assessment whatsoever, given by the Appeal Tax Court through its assessor, Williams, notified the plaintiff in error "*that the valuation of its lot * * * has been assessed * * * for 1903.*" (Record, page 21.)

At the hearing in the Baltimore City Court, the Acting Chief Assessor of the Appeal Tax Court, Coblens, testified that "all assessments of real estate in the city of Baltimore are made upon the whole value of such real estate without regard to particular interests therein." (Record, page 24.)

The fifth paragraph of the petition of appeal to the Baltimore City Court avers, "that the Appeal Tax Court did on the 30th day of September, 1902, assess *said real estate* for the purposes of taxation for the year 1903, *to your petitioner as owner of the same.* * * *" (Record, page 9.)

This allegation is in terms admitted to be true by the first paragraph of the Agreement of Counsel (Record, page 18); and it is also by the fifth paragraph of the same instrument admitted, "that the assessment complained of is an assessment upon and covers *all the land* in the possession of the appellant corporation under the grant from the United States Government, referred to in the petition and appeal, and the riparian rights and appurtenances of said lands, including the piers; and that *said assessment is made upon said land* and appurtenances, as though it were the property of said appellant corporation; * * *" (Record, page 20.)

The prayer offered by the plaintiff in error, (Record, page 24,) to which no special exception was filed, as was necessary under the Maryland practice, if evidence were lacking of any proposition of fact contained in it, also shows that the point at issue involved an assessment upon the land.

The order of the Baltimore City Court (Record, page 23,) provided "that the property concerned in the appeal in this case, is lawfully subject to taxation by the State of Maryland and the city of Baltimore, * * *" thus confirming, to quote the Court of Appeals, the action of the Appeal Tax Court.

This was the order from which the appeal was taken to the Court of Appeals, and it is the order which that Court "affirmed," without alteration in any respect by its final judgment, entered April 2, 1903, (Record, page 29,) which judgment in its turn is now sought to be reversed by the writ of error here. Such are the facts.

B. Moreover, we maintain that such an assessment, *i. e.*, an assessment upon the land itself, without regard to the various estates of those having interests in it—is the only form of assessment for which provision is made by the statutes of the State of Maryland. By this we do not mean that the State *may not* tax *estates* in land, but in fact it *does not*. The question is not one of power, but of method. The system

does not provide the machinery for the making of any other kind of assessment and for enforcing the payment of the taxes levied thereunder. This appears both from the statutes providing the method of making of assessments, and from the provisions of the law regarding sales for non-payment of taxes, but more particularly the latter.

The Statute, under which the assessment here was made, is found in Sections 145 and following, of Article 4 of the Code of Public Local Laws of Maryland, as amended by Chapter 123 of the Acts of 1898, known as the "Baltimore City Charter."

By section 148 every assessor is directed to inform himself, by all lawful means, of *all property, real and personal,* and stock or investments in the city liable to taxation and assessment and which may have been omitted in the assessments * * * and *to value the same* at the full cash value thereof, and to make return to the Appeal Tax Court; and for the purposes of said section the said assessors are thereby clothed with the powers of general assessors.

By section 150 it is provided "that before increasing the assessment of any property theretofore assessed, or adding any new property not valued and returned to them by the proper assessor, it shall be the duty of the said Court, as the case may be, to notify the owner of such property by written or printed summons containing such interrogatories in regard to the property as they may require to be answered on oath. * * * In case such owner, after being summoned, shall fail to answer in writing on oath, or to appear and answer orally such interrogatories, *such Court,* after such return day has passed, *may proceed* to revalue and reassess said property, *or add such new property,* according to its best judgment and information in the premises * * *"

By section 164 A, it is also provided that "*the Appeal Tax Court of Baltimore City shall have the power at any time* to value and assess all personal property and to revise such

valuations and assessments *and to review all valuations and assessments of real property in said city*, and to lower or increase said assessments of real or personal property *and to take steps for the discovery and assessment of all unassessed property of every kind.* * * * Whenever said Court shall propose to alter or change any assessment or make any new assessment, they shall, before such assessment is made, give at least five days' notice thereof in writing to the owner of the property to be assessed or reassessed, and if any owner be not found within the limits of said city, then to the person in possession of the property to be assessed, or in whose custody the same may be, *or if it be land and no one be in apparent occupancy thereof*, then by a notice posted on said land. * * * "

We submit that the word "property," when it appears in these sections, means things material, not things incorporeal, lands or chattels, not rights, interest and estates, and though it is required that land or other property shall be assessed to the owner, if found, it is none the less required that it shall be assessed and taxed, whether the owner be found or not. The purposes of this are manifest. The obvious fairness of giving notice to the owner of the various steps in the assessment, levy and collection of taxes is one object, and another is the resultant simplicity in the administration of the tax laws. But the act of assessing property to an individual is efficacious, its last analysis, only to create a *personal* liability against the person to whom the taxes are charged, when levied. For, as we have shown, provision is expressly made for the assessment of lands where the owner is unknown, and, consequently, such a charging of the assessment and resultant taxes is not essential to validity of the assessment and levy. Conversely, it is also true that in order to create a liability *in rem* against the land itself, the land must be assessed without regard to the variety of estates held in it, although it is also true that the assessment to the proper owner or occupant has been, under some statutes, made essential to the validity of the assessment and levy. And

this is none the less true, because it has been held in Maryland that *persons*, not property, are taxed. For their property is assessed, and the resultant taxes are levied against and constitute a lien upon it, and their payment of them is enforceable, if by no other means, through a sale of the property, the *res* itself.

Cooley on Taxation (3d Ed.), page 721, *et seq.*
Baltimore vs. Canton Company, 63 Md. 218, 234-5.
Mayor vs. Boyd, 64 Md. 10.
Cooper vs. Holmes, 71 Md. 20-30.

But, as we have already remarked, this feature of the tax laws of Maryland is the more emphasized by the sections of the statutes relating to sales of land for non-payment of taxes. The laws in force in Baltimore City are contained in sections 43, and following, of the City Charter.

Section 143 provides: "Whenever it shall become necessary to sell any part or parcel of ground in the city of Baltimore, improved or unimproved, for the payment of any taxes or assessments, of any nature or kind whatever, levied or charged, the City Collector shall first give notice by advertisement. * * *"

Section 44 provides: "The City Collector shall require the purchaser of such property on the day of sale, or the day next succeeding, to pay on account of said purchase the amount assessed or taxed on the lot so sold."

Sections 45 and 46 provide for the execution of the deed for the lands sold and the investment of such portion of the proceeds of sale as may exceed the amount of overdue taxes, interest charges and cost.

Section 47 provides: "When any lot or parcel of ground in the said City shall be sold by reason of the non-payment of the tax or assessment due thereon, the owner or other person having an estate or interest therein shall have power to redeem the same. * * *"

Section 48 provides the method for procuring a final ratification of a sale made under the preceding sections. It reads:

"In all cases where lands held in fee-simple or by lease have been sold, or shall be sold for payment of taxes in arrears, according to existing laws, it shall be the duty of the City Collector to report the said sale, together with all the proceedings had in relation thereto, to the Circuit Court of said city. The Court to which such report shall be made shall examine the said proceedings, and if the same appear to be regular, and the provisions of law in relation thereto have been complied with, shall order notice to be given by advertisement published in such newspapers as the Court shall direct, *warning all persons interested in the property sold to be and appear by a certain day in said notice to be named, to show cause, if any they have, why said sale should not be ratified and confirmed; and if no cause or an insufficient cause be shown against the said ratification, the said sale shall, by order of said Court, be ratified and confirmed, and the purchaser shall, on the payment of the purchase money, have a good title to the property sold;* * * *."

This is the only method of making a sale, and the provisions of the sections are highly illuminating of the particular question now at issue. Authority is at hand, if authority indeed be needed, to declare the true effect of these sections. But irrespective of authority, can it be doubted that a sale made under the provisions of these sections, is and can be only a sale of the lot of ground itself? Provision is expressly made by section 47 for any person having an interest or estate in land, so sold, other than the owner to whom it is assessed, to redeem, thus making it clear, if the words of section 44 were open to doubt, that the sale extinguished all interests, estates and titles and not merely that of the "owner"—in other words, that the sale was one of property in the material sense, and not of property in the sense of rights, interests or estates in the land or thing material sold.

But this is not all. The provision of section 48 is that after the conditions of the sale have been complied with and the required formalities observed, "the purchaser shall have a good title to the property sold." This has been held by the Court of Appeals of Maryland to mean that the purchaser shall hold the lands purchased in fee simple.

Cooper vs. Holmes, 71 Md. 20.

That case involved the construction of the local tax law of Prince George's county, Maryland, and the validity of a tax sale made in pursuance of its terms. Judge McSherry, then an associate judge, but now chief judge of the Court of Appeals, wrote the opinion. He said on pages 26 and 27: "What has just been said with regard to the effect of the order of ratification has relation to sales made under the statutes alluded to. It is claimed, however, that the sale in question here was made under a local law, the Act of 1882, ch. 317, which, it is insisted, does not give to the order of ratification the force and effect accorded it by the Act of 1874, ch. 483. There is some difference between the two statutes, and wherever they conflict, if they do conflict at all, the local law must prevail. (Code, art. 1, sec. 10.) The general law declares that if no cause, or an insufficient cause be shown, the sale shall, by order of Court be ratified and confirmed, and the purchaser shall, on payment of the purchase money, *have a good title to the property sold.*" (The italics are the Court's.) The local law provides for no order *nisi*, but directs the Court to ratify the sale, if it shall appear that the collector "has complied with the requirements of the Act and the existing laws of the State of Maryland not inconsistent with the provisions of this Act, * * * either party to have the right of appeal to the Court of Appeals; and if not redeemed within the time prescribed by existing law, the treasurer shall convey the same *in fee simple* (the Court's italics again) to the purchaser thereof." Whilst the general law declares that the purchaser shall have a good title, the local law, omitting those words uses others of substantially

the same import, viz: "the treasurer shall convey the same *in fee simple* (Court's italics) to the purchaser." The difference between the Acts consists rather in the form of expressing the same design, than in any substantially repugnant provisions."

The words of the general statute, quoted by Judge McSherry, are identical with those of the Baltimore City Charter, and it therefore follows that a purchaser at a tax sale in Baltimore city, has the right to demand, and, *e converso*, the City Collector may offer for sale only, a fee simple title to the land levied upon, free from the conflicting rights, claims, interests and estates of other parties, and free from all incumbrances, liens and conditions.

See also—Cooley on Taxation (3d Ed.), page 960, *et seq.*
Black on Tax Titles (1893), secs. 419-22, incl.
Burroughs on Taxation (1877) page 346.
Textor vs. Shipley, 86 Md. 424, at page 438.
Northern Pacific R. R. Co. vs. Traill Co. 115 U. S., 600.
Heffner vs. Northwestern Mut. Life. Ins. Co., 123 U. S. 747.
Emery vs. Boston Terminal Co., 178 Mass. 172.

This being the doctrine hitherto enunciated and the construction hitherto put upon the statutes referred to, by the Courts of Maryland, it will not be presumed, in the absence of the most express and unequivocal statement, that the Court of Appeals intended to qualify its previous decisions, when it said in the course of the opinion in this case (Record, page 29): "It has always been the custom and policy of this State, when it became necessary to sell for non-payment of taxes land in which several parties held different estates, *all of which were subject to assessment and taxation*, to sell the fee simple estate in exercise of its sovereign power (Cooper vs. Holmes, 71 Md. 20; Textor vs. Shipley, 86 Md. 424), but it is manifest that the sov-

ereign power of the State does not embrace within its operation the right or estate of the Federal Government in the land now in question."

And while we respectfully submit that the learned Court has not told the whole story, and that it should have added to the words "custom and policy of this State," the additional phrase "in pursuance of a mandatory provision of the Statutes, consonant in their effect with a simple provision of general law," which, in view of an universally accepted rule of interpretation, must be most strictly construed and held to confine the powers and duties of officers acting thereunder to the strict letter of their expressed authority, (See Polk vs. Rose, 25 Md., 153) we also contend that even if the Collectors and Treasurers of Maryland can be held to have power to sell partial interests or estate in land, short of the land itself, and all estates, interests and rights in it, still such a proceeding and sale is not possible in this case, nor can it be permitted by this Court, following a well-established line of decisions, as we shall hereafter endeavor to show.

C. If we be right in this, that the assessment *can* be made only upon the land, and not upon the several estates in it (as indeed we have sought to show has in fact been done as well by the Court of Appeals as by the assessors and the lower Court of Maryland), then the assessment is but a step in the attempted taxation of property of the United States and is necessarily void. But supposing, for the sake of the argument only, that the assessment has been made only upon the interest of the plaintiff in error in the land, and not upon the land itself, it is interesting to observe the situation that would then result.

The case of Moriarty vs. Boone County, 39 Iowa, 634, is an authority in point. There the Supreme Court of Iowa had occasion to pass upon the validity of an assessment made under the Statute of Iowa, which expressly permits the taxation of interests in land, upon the *interest* of a homesteader in government lands which he was in the course of

taking up under the Act of Congress, but to which his title was not yet complete.

The Court points out with great clearness the impossible situation to which an attempt to enforce the assessment by sale would lead, saying, at page 638: "But suppose after the tax sale the person making the homestead entry should abandon his actual residence upon the lands for a period of more than six months. In that case, what becomes of the lien for delinquent taxes, and what interest does the treasurer's deed convey? The land reverts to the Government, the lien is extinguished and the deed of the treasurer becomes mere waste paper. * * * It is conceded the legal title need not of necessity vest in one before he becomes liable for taxes. But he must have a more tangible interest than one dependent upon continued occupancy for its existence and liable to annihilation by an absence of six months. No case can be found in this State in which such an interest as the one under consideration has been held liable to taxation. All of them will be found to be cases where some corporation or individual, although not possessed of the legal title, yet is in a position to be entitled to a patent from the United States."

Applying the method of the Supreme Court of Iowa in that case to the facts of the present, we find that this is the position which would be reached. The City Collector, if he offered the land for sale in fee simple, would make a void sale, for two reasons, either because he would thereby be attempting to make sale of property of the United States, which is confessedly beyond his power, or because, if for this reason it be contended that his sale must be held to apply only to that which he could lawfully sell, *i. e.*, the estate of the plaintiff in error, then the purchaser would not be getting what had been advertised and offered, and what it is provided by statute he should receive—namely, an estate in fee simple in the land purchased. In either event, the sale would be set aside at the instance of the purchaser, or any other person having an interest in the land.

But supposing that the City Collector has authority to offer for sale the interest of the plaintiff in error alone in the land, even in the teeth of the statutes and decisions which we have referred to—what could he sell? He could not offer for sale an estate which was obliged *passively* to suffer or permit other rights of user in the land in which it existed, such as a fee simple subject to a simple right of way or flowage of water. (See opinion of Judge Stockbridge, Record, page 22.) In other words, the Collector could not offer for sale *the land*, subject to the rights of others therein. In order to preserve properly all the rights and estate of the plaintiff in error in this land, the City Collector would have to offer the land, subject to an *actual, continuing, costly obligation, namely, that of maintaining and operating the dry dock*, keeping it perpetually in good repair, and always ready for use by the United States Government free of charge. Has the case ever before been recorded, where a City Collector, in order to enforce the payment of taxes, sold the "privilege" to expend large sums of money annually, willy-nilly?

Moreover, a fee simple title now in Maryland, as in most other States, has been held to be an allodial title,—a title not "holden of" any one.

Matthews vs. Ward, 10 G. & J. 443.

Could, therefore, a sale of the land in question be made, which would not construct or interfere with the title and rights of the United States therein, and which would not at the same time result in the purchaser most unequivocally "holding the land of" the United States, subject to the terms and conditions of the grant in question? Could such a title be considered allodial?

We do not, of course, maintain that the grant itself is not of value, or that the possession of the land subject to its conditions is a financial burden to the plaintiff in error, but the fact remains that a sale by the City Collector would confer necessarily upon the purchaser a "right" to expend the

sums of money which are necessary for the maintenance and operation of the dry dock, coupled with a restriction that the land could never be diverted to any use whatsoever other than maintenance and operation of such dock.

Finally, the plaintiff in error would have it absolutely in its power to defeat the remedy by sale and the title of the purchaser to the land, or estate therein, if you will, sold. For during the year given by law for redemption, its estate could be forfeited by any one of a variety of acts of omission or commission, with the result that the whole land and all title to it would be vested in the United States alone, and the purchaser have lost all rights in or over it.

Consequently, we submit that the Statutes of Maryland, as constructed by the Court of Appeals of this State, make no provision for the taxation of estates in land, but only for the assessment and taxation of land itself, and that they were in fact fully and strictly observed in making the assessment here; but we also contend that even if they do permit of assessments upon partial interests or estates in land, and that the Court has such an assessment before it in this case, it is none the less void, and the provisions of the Statutes in this respect must of necessity be inoperative here, from the peculiar conditions of this case, growing out of the interest of the United States in this land. It, therefore, becomes imperative to inquire upon what theory or theories the Courts of Maryland base or justify their action in making the assessment now complained of.

IV.

The theories of the Baltimore City Court and of the Court of Appeals of Maryland on which those Courts sustained the State's right to tax.

Both of the state courts recognized the existence of the doctrine upon which the exemption of Federal property from state taxation rests; but we submit that neither of them gave that doctrine its fullest application or completely

realized its scope. In any event, it becomes necessary to inquire with particularity how the right to tax was sustained and upon what grounds it was put.

On the one hand, the learned Judge of the Baltimore City Court dealt with the problem in the following manner:

"It is of course evident," says Judge Stockbridge (Record, page 22), "from the refusal of the prayer of the petitioner, that in the view of the Court the property upon which the aseessment has been made is not property of the United States Government in any sense, but it is property of the corporation, the petitioner. It is, however, property charged with a certain right of use, under definite conditions, by the United States Government, and the character of the uses to which it can be put is limited both by the Act of Congress and the terms of the grant. These facts do not, in my judgment, at all affect the question of ownership of the property, but rather constitute a charge upon the property not very dissimilar from what would exist, if the property was held by the petitioner subject to an easement such as a right of way or flowage of water, and which charge is, therefore, a proper element for consideration in the determination of the value to be taken in the sense of a market value or value for purposes of taxation. There is probably no class of property which it is more difficult to place a proper valuation on than a lot such as this, and opinions of individuals, therefore, may naturally be expected to vary widely, since those opinions must inevitably be largely conjectural." And the learned judge then proceeded to ascertain, as best he could, the value of like lands unencumbered, and after making allowance for the peculiar conditions of this property, *fixed its value, not* the value of the interest or estate of the plaintiff in error therein, at the sum of $70,650.

It is apparent that the learned judge used the word "property" as equivalent to land or real estate, and not in the sense of a right in the land, and it is also very evident that he saw and appreciated the difficulties in the way of the

right to tax, and made an earnest effort to work out a theory upon which the right could be upheld. But we respectfully submit, he failed. In our view, the land could no more be taxed, without taxing the right of the holder of the easement in gross of the judge's theory, than without taxing the servient estate of the plaintiff in error, and still less could it be sold under the Maryland statute without extinguishing those dominant rights of the United States. And it may also be repeated, that in whatever sense the learned judge used the word "property" in his opinion, or on whatever theory he proceeded, he confirmed the action of the Appeal Tax Court in making an assessment on the lot of ground itself. For this we have the express statement of the Court of Appeals.

The Court of Appeals, on the other hand, states the proposition in this way (Record, page 26): "It is conceded that lands held by the United States are not taxable by the State within whose boundaries they lie, and that this disability remains effective until the Government sells the lands, when it terminates. * * * The only question in this case is whether the transaction between the United States and the appellant under which the latter is now in possession and enjoyment of the land was such as to terminate its exemption from taxation. * * *"

And again, on page 28: "* * * The deed followed the terms of the Act of Congress, and conveyed the land to the appellant upon the conditions therein set forth.

"Under this conveyance the appellant did not acquire the absolute fee simple title to the land but took only an estate therein limited to a particular use under special conditions, and liable to be defeated upon a misuser or a nonuser; yet it did take a valuable interest in the land of which it has been in full possession and enjoyment every since. The deed to the appellant contains no restraint upon the alienation of the estate conveyed by it, which partakes of all the essential features of property. The fact that the United States

retains and may at some future time exercise the right to retake possession of the land upon a breach of the conditions of the grant ought not, when no such breach is alleged, to enable the appellant to escape its just share of taxation. If the land should ever revert to the United States under the terms of the grant the taxable interest in it would be destroyed and in that event the assessment of it should be stricken off the books of the tax department. Or if the United States should in the exercise of its reserved right use the dock on the land for its own vessels continually or to such an extent as to materially deprive the appellant of its possession and enjoyment, that circumstance would form proper ground for a suitable abatement for the time being of the assessment of the property for the purposes of State taxation. * * *"

Again at page 29—"Of course if it should ever become necessary for the State or city to sell this property of the appellant for the non-payment of taxes nothing more could be sold than its conditional estate in the land and the permanent improvements thereon, subject to all of the rights of the United States therein. * * *"

"We hold that the conditional interest or estate of the appellant in this land, subject to the rights of the United States therein, constitute property within the meaning of section 2 of article 81 of the Code, and is taxable by the State and the city of Baltimore. In view of the fact that the situation of the title to the land is such that the absolute fee therein cannot be taxed, and therefore could not be sold for non-payment of taxes, the assessment books should be so modified as to show that the estate assessed is subject to the right and interest of the United States in the land and improvements."

The Court of Appeals thereupon proceeded to affirm the order of the Baltimore City Court, which made an assessment upon the land, as such!

We have pointed out that Judge Stockbridge used the word "property" as equivalent to the land itself, and that in our view the learned judge's opinion is open to the criticism, that it loses sight altogether of the right of reverter in the United States, consequent upon a misuser or a nonuser of the land, and also that the learned judge failed to take into account that that right, or interest, or estate, would necessarily be destroyed by a sale for the enforcement of the taxes levied upon the *land*, as such, though he was of the opinion that the land itself must be assessed in order to make a valid levy, and not the interest of the plaintiff in error therein. Whereas the Court of Appeals of Maryland, though in the opening sentence of its opinion, it states that the assessment was upon "the lot of ground," and it affirmed Judge Stockbridge's order, which "confirmed" the action ot the Appeal Tax Court, in making an assessment upon the land, uses the word "property" not in the sense in which it is used by the Maryland Statutes, namely, as meaning corporeal things or land, but as meaning any interest, estate or right in land or other material thing, and, throughout the balance of its opinion, deals with the assessment as though it was made only upon the interest of the plaintiff in error in the land.

The argument of the Court of Appeals amounts to this: "This interest of the Dry Dock Company in this land is property, and is therefore taxable." But as we shall endeavor to show, this is precisely the same argument advanced by counsel and sustained by State Courts in a line of cases which have come before this Court, and in every one of which this Court has held the argument unsound, and declared the attempt at taxation made in pursuance of it void and nugatory.

Let us consider this line of cases. But before doing so, we desire again to state that we do not take the ground, and it is not in any sense essential to our argument, that the Maryland Court of Appeals has misconstrued the statutes of its own State. For we contend that whatever the true

meaning of the Maryland statutes, and whether or not it is permissible under them to assess interests or estates in land, as distinguished from the land itself, the rule of the cases about to be called to the Court's attention is equally applicable, and equally prohibits the assessment and taxation of the interest of the plaintiff in error in this land.

V.

THE STATE OF MARYLAND MAY NOT TAX THE INTEREST OF A PRIVATE PARTY IN LANDS IN WHICH THE UNITED STATES ALSO HAVE AN INTEREST, WITHOUT THE CONSENT OF THE UNITED STATES.

This is the principle underlying our second assignment of error. In stating it, we are fully aware that there are some decisions of state courts to the contrary, but we submit that the reasoning upon which they are based is unsound, and that the true doctrine—the doctrine of this Court, which must be controlling—is as we have stated it.

Let us examine the cases.

The case of Kansas Pacific Railway Company vs. Prescott, 16 Wall. 603, involved the right of the State to tax lands granted to the Railway Company by the United States, upon condition that before the lands be conveyed to the company the cost of surveying, selecting and conveying them should first be paid. These costs had not been paid, and the lands had not been conveyed. But they had been surveyed and ascertained, and the right to a patent was complete upon the payment of the costs. Mr. Mohler, counsel for the State of Kansas, in his argument in support of the right to tax, followed the same line of argument as that pursued by the Court of Appeals of Maryland, in this case, contending that the equitable, though inchoate, right of the Railway Company constituted property, within the definition of Chief Justice Marshall in Delassus vs. U. S., 9 Peters, 133, and

that it was therefore taxable. "*If such inchoate right is 'property,'*" says Mr. Mohler, "*why not taxable?*"

(See Lawyers' Ed. Sup. Ct. Reps., Book 21, page 374.)

But this Court, avoiding this confusion of ideas, and declining to accede to this view, said, Mr. Justice Miller delivering the opinion (page 608):

"While we recognize the doctrine heretofore laid down by this Court, that lands sold by the United States may be taxed before they have parted with the legal title by issuing a patent, it is to be understood as applicable to cases where the right to the patent is complete, and the equitable title is fully vested in the party without any thing more to be paid or any act to be done going to the foundation of this right.

The present case does not fall within that principle. Two important acts remain to be done, the failure to do which may wholly defeat the right of the company to a patent for these lands.

The first is the payment of the costs of surveying, It is admitted that this has never been done in the present case. If the company have such an interest in these lands that they can be sold by the State under her power of taxation, then the title is divested out of the Government without its consent, and the right to recover the money expended in the surveys is defeated. As the Government retains the legal title until the company or some one interested in the same grant or title shall pay these expenses, the State cannot levy taxes on the land, and under such levy sell and make a title which might in any event defeat this right of the Federal Government reserved in the Act by which the inchoate grant was made."

Shortly after the decision in this case, and after the Court had in Union Pac. R. R. Co. vs. McShane, 22 Wall. 444, stated that in other respects than that above referred to, the doctrine of the Prescott case was too broad, precisely

the same question was again presented to the Court in the case of Northern Pac. Rw. Co. vs. Traill Co., 115 U. S. 600, and Mr. Justice Miller again speaking for the Court, reconstrued his own words above referred to, in the following language (page 610): "It may be well to restate the grounds on which this decision (*i. e.*, Prescott case) rests."

"The United States made a magnificent grant to this company of lands equal in quantity to forty or fifty thousand square miles, an area as large as an average State of the Union. It thought proper to require of the grantee the payment of the cost of making the surveys necessary to the location and ascertainment of these lands. To secure the payment of these expenses, it decided to retain the legal title in its own hands until they were paid. The Government was, as to these costs, in the condition of a trustee in a conveyance to secure the payment of money. But if the land was liable to be sold for taxes due to State, territorial or county organizations, this security would be easily lost.

"No sale of land for taxes, no taxes can be assessed on any property, but by virtue of the sovereign authority in whose jurisdiction it is done. If not assessed by direct act of the Legislature itself, it must, to be valid, be done under authority of a law enacted by such Legislature. A valid sale, therefore, for taxes, being the highest exercise of sovereign power of the State, must carry the title to the property sold, and if it does not do this, it is because the assessment is void.

"*It follows that if the assessment of these taxes is valid and the proceedings well conducted, the sale confers a title paramount to all others, and thereby destroys the lien of the United States for the costs of surveying these lands. If, on the other hand, the sale would not confer such a title, it is because there exists no authority to make it.*

"At all events, the holder of the equitable title to the lands has a right to prevent a sale which would have the effect of impeding the United States in the assertion of her right to them until these costs are paid."

In still other cases, namely, Wisconsin Central Rw. Co. vs. Price Co. *(supra)* the same argument was made. That case was brought to the Supreme Court of the United States on a writ of error, addressed to the Supreme Court of the State of Wisconsin, and is reported below in 64 Wisconsin, 579. From the opinion of the Court, it appears that the Court not only followed precisely the same line of argument as that of the Maryland Court in this case, and of counsel and Courts in the other cases referred to, but the statute of Wisconsin, under which the assessment complained of was made, was even broader and more explicit in its terms than the similar Maryland Statute. On page 594, *et seq.*, the State Supreme Court said: "The statutes declare that 'taxes shall be levied upon all property in this State, except such as is exempted therefrom. The terms "real property" "real estate" and "lands," when used in this title, shall include, not only the land itself, but all buildings, fixtures, improvements, *rights and privileges* (the Court's italics) appertaining thereto. * * * The person holding the *contract or certificate* of sale of any real property, contracted to be sold by the State, but not conveyed, shall be deemed the owner for such purpose. (Secs. 1034, 1035, 1043 R. S.) There is no claim that any of the lands in question are exempt by reason of section 1038, or any statute of this State. The special exemption given by Ch. 21 Laws of 1877, the validity of which was sanctioned by this Court, expired before the levy and assessment in question. (Wisc. Cent. R. Co. vs. Taylor Co. 52 Wis. 37.) In the language of the Supreme Court of the United States, "Congress has not seen fit, either expressly or by implication, to impose any restriction upon the taxing power of the State. That subject was remitted, as under the circumstances it might well be, wholly to her wisdom and discretion." (22 Wall. 571, 572.) In the case last cited it was, in effect, held that "the equitable or inchoate title of the company to the residue of the lands" was capable of being mortgaged, and hence taxed. Ibid."

And in the course of argument of that case before this Court eminent counsel for the State cited numerous authorities to support the proposition that "every species of title to and interest in property, whether inchoate or complete, when vested in an individual, is taxable unless expressly exempted," (See Lawyers, Ed. Sup. Ct. Reps. Book 33, page 692), but again the argument was declared untenable.

As we have already stated, this is precisely the same argument advanced by the Court of Appeals of Maryland in this case. "We hold that the conditional interest or estate of the appellant in this land, subject to the right of the United States therein, constitutes property within the meaning of section 2 of article 81 of the Code, and is taxable by the State and city of Baltimore." (Record, page 29.)

So said the Supreme Court of Wisconsin in the case appealed from it, and so said eminent counsel in their arguments in support of the right to tax in all the cases cited. But this Court refused to admit the contention, and Mr. Justice Miller in the case of Northern Pac. Rw. Co. vs. Traill Co., plainly showed the reason why, when he pointed out, that the only true test of the assessment is to be found in the power to sell, that it is impossible to sell less than the whole, and to sell the whole necessarily requires a sale of the United States' interest, their "property," which is likewise impossible.

It may also be observed that the rule of law thus laid down led to abuses, which were recognized by Mr. Justice Miller in the case of Northern Pac. Rw. Co. vs. Traill Co. at pages 610-611: "We are aware of the use being made of this principal by the companies, who, having earned the lands, neglect to pay these costs in order to prevent taxation. The remedy lies with Congress and is of easy application. * * * The Courts can do no more than declare the law as it exists."

While it is not pertinent to the issue of law now involved, it may be remarked here that the same abuse does not exist in this case. For, whereas there the railway companies were

securing the exemption from taxation by withholding the just dues of the government, the plaintiff in error here maintains the exemption of this land by reason of the strict and faithful performance of all its obligations under the grant to it.

The case last referred to was decided December 7, 1885, and immediately thereafter by Act of July 10, 1886, Congress provided a remedy for the evil. This Act provided "that no lands granted to any railroad corporation by any Act of Congress shall be exempted from taxation by States, territories and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting and conveying the same, or because no patent has been issued; * * * Provided that any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, collecting and conveying to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide, and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands; * * *"

U. S. Statutes at Large, Vol. 24, page 143.

Thus conferring upon the local authorities in the cases falling within its terms, what had not previously existed in any case, namely, a right to make sale of the interest of a private party in lands in which the United States also had an interest.

It may be remarked that the title of the Act is "*An Act to provide for taxation of railroad-grant lands and for other purposes,*" and that its scope, as disclosed both by its title and the necessarily limited effect of its provisions, restricts its application to railway land grants exclusively. There is nothing in it to extend its effect to the present case.

Since the passage of this Act, there have been cases in this Court in which the true meaning of the Act has been drawn in question, among them,

Central Pac. R. R. Co. vs. Nevada, 162 U. S. 512.
Northern Pac. Rw. Co. vs. Meyers, 172 U. S. 589.

But those cases turned only, in so far as they touch at all upon the question now at issue, upon the construction of the Act of Congress, and they, with the Act, serve to show all the more clearly that there existed no power in a State in any case to tax the interest of an individual in lands in which the United States also had an interest before the passage of the Act, and now necessarily such power only exists where the statute expressly gives it.

Cooley on Taxation (3d Ed.), pages 137-8-9.

And it may be asked, what would have been the need for this Act, if without it the partial interests of the railway companies in the lands granted were subject to taxation, without affecting the rights and estates of the United States therein, particularly, as it was expressly conceded in the later cases, above referred to, that the intent was to tax only the interests of railway companies, and not the land itself or the interest of the United States therein?

Can any other answer be made to this question than the conclusion to which our whole argument is addressed?

We submit that the conclusion is irresistible that even if the Statutes of Maryland do make provision for the assessment and taxation of interests or estates in land, as contradistinguished from the land itself, and that such an assessment has been made upon the interest or estate of the plaintiff in error in the land in question, both of which propositions we deny, nevertheless such assessment can not be lawfully made upon that interest or estate in this property, and is, therefore, void; and also that under all the decisions of this Court the plaintiff in error has a perfect legal right to maintain these proceedings to have such assessment declared null and void, for the protection of the interest of the United States in the land. (Nor. Pac. Rw. Co. vs. Traill Co., *supra*, at page 610.)

This disposes of our first and second assignments of error. The third and fourth rest upon somewhat different grounds. We will discuss them in order.

VI.

THE LAND IN QUESTION, WITH THE DRY DOCK CONSTRUCTED ON IT, IS A FEDERAL AGENCY, ACTUALLY USED BY THE UNITED STATES, IN THE EXERCISE OF ITS CONSTITUIONAL POWERS, AND HENCE IS NOT SUBJECT TO STATE TAXATION.

We have hitherto been considering the interest of the United States in this land from the standpoint of the law of real property, and disregarding, for the purposes of that portion of our argument, the nature of the interest of the United States. Thus we have to deal not merely with a right of reverter, coupled with certain rights of present user, but the nature of the conditions of the grant and the rights of user have a peculiar bearing upon the State's right of taxation. It is our contention that it is the effect of these peculiar conditions and provisions to constitute the land granted by Congress and the dry dock constructed on it, a "Federal agency," and that, irrespective altogether of questions of title and property, the land is not subject to State taxation for this reason.

The succinct head notes to the case of McCulloh vs. Maryland, state:

"If a certain means to carry into effect any of the powers, expressly given by the Constitution to the government of the Union, be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion and not of judicial cognizance;" and again, "The State governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers;" and Chief Justice Marshall, in the opinion, said at pages 409-410: "The government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means, and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of estab-

lishing that exception." Consequently, there is no reason why Congress should not have made a contract, such as this, for the construction of a dry dock for the use of the government by a private party, which, when the use of the dry dock was not required by the government, should have the right to let it to other parties and to make such appropriate and not inconsistent use of the land, granted to it, as its business sagacity might suggest. There was nothing unconstitutional in this, we say. For if there were any such impediment, the grant would be void, and there would be nothing left of the right to tax.

McCulloh vs. Maryland, 4 Wheaton, 316.
Cooley's Constitutional Limitations (7th Ed.), at pages 45 and 678, *et seq.*
Cooley on Taxation (3d Ed.), at pages 129, etc.
Black on Tax Titles (1893), sections 5, 6, 7.

On the other hand, we submit that under these circumstances, it cannot be said that the effect of the Act of Congress, making the grant, was not to continue the use of the lands for public purposes, just as much as if they had been kept as part of the Fort McHenry tract, or as if a dry dock had been constructed on them at the public expense. In fact, on the last supposition the government could have had no greater right to use a dry dock, built at its own cost, than it has to use the one now on the land, built at the cost of the plaintiff in error. The words of the Act of Congress are: "The said Dry Dock Company shall be required to accord to the United States the right to the use forever of the said dry dock, at any time, for the prompt examination and repair of vessels belonging to the United States free from charge for docking," (Record, page 18), and failure to do so works an instant forfeiture of the whole estate of the plaintiff in error, and all its expenditures for the construction of the dry dock and its appurtenances, or the erection of other buildings on the land. Moreover, it is legally possible that the government may have used the dock 365

days in each of the 25 years since the grant was made, or may require its constant use at any time in the future.

Nay, the government has a positive advantage from the present arrangement, for it is under no expense for operation and maintenance.

The case of Northern Pac. Rw. Co. vs. Townsend, 190 U. S. 267, which we have already called to the Court's attention, dealt, as we pointed out, with a grant of lands for a railroad right of way, in which the United States had no right of present user, or other interest, save the implied right of reverter in case of abandonment or diversion to any other use, but certain incidents of the railway company's estate were described by this Court in language so applicable to the question at issue here, that we cannot refrain from quoting it. Said Mr. Justice White, at pages 271-2:

"This being the nature of the title to the land granted for the special purpose named, it is evident that to give such efficacy to a Statute of Limitations of a State as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly; for, as said in Grand Trunk R. R. Co. vs. Richardson, 91 U. S. 454, 468, the railroad company * * * is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted." Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in Northern Pac. Rw. Co. vs. Smith, 171 U. S., 261, 275, speaking of the very grant under consideration: "By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." * * *

"To repeat," continues the Court on page 272: "The right of way was given in order that the obligations to the

United States assumed in the acceptance of the Act might be performed, Congress having plainly manifested its intention that the title to and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated, without overthrowing the Act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

Applying that language to this case, we think it must be admitted not only that the land was given in order that the obligations to the United States, assumed in the acceptance of the Act, namely, the construction, maintenance and operation of this dry dock, might be performed, but also that the very discharge of those obligations itself was designed to, and did in fact, constitute a lawful means of putting into operation certain powers, expressly conferred upon Congress by the Constitution, conspicuous among them the power "to provide and maintain a navy" (Constitution, Art. 1, Sec. 8, Clause 13), and that neither has any private party the right to divert this land directly or indirectly from the purpose to which it is put by Congress, namely, the execution of those obligations, nor has the State of Maryland any greater power to abridge or obstruct their execution in like manner, whether the diversion of the land be induced by the State of Maryland, in the exercise of its sovereign right of taxation, or of eminent domain, or of any other such right.

We submit, therefore, that this case falls strictly within the doctrine of McCulloh vs. Maryland.

See also—Van Brocklin vs. Tennessee (*supra*), and the cases therein cited.

Cooley's Constitutional Limitations (7th Ed.) pages 45 and 612, *et seq.*

It must be understood that no claim is made that the plaintiff in error, the corporation, is exempt from taxation by the

State of Maryland. The claim is not that it is a federal agency, in any sense. On the contrary, it is expressly stated in the Sixth Paragraph of the Agreement of Counsel (Record, page 20), that the plaintiff in error is assessed and pays taxes to the State of Maryland, just like any other Maryland corporation. But it does maintain that the United States not only have an interest or estate in the lands in question, constituting "property," but that this interest or estate consists of certain rights of user, certain duties and obligations *due by the land, in whosoever hands it may be*, which constitute the land itself, and the permanent and immovable improvements constructed on it, an instrumentality or agency of the Federal Government, used by it in the exercise of its constitutional powers.

Nor is it a case, we submit, that falls within the doctrine of the "Railroad Cases," and other decisions of this Court, in which corporations, created by Act of Congress in some cases, and likewise in some cases objects of its bounty, have claimed exemption from State taxation for themselves and all their property, real and personal, on the ground that through contracts to perform certain services for the Government they, the corporations themselves, have become governmental agencies, and that all their property necessary to the performance of their contracts with and obligations to the Government must perforce be exempt from taxation by the State in which such property may be found. Among such cases are

Thompson vs. Union Pac. R. R. Co., 9 Wall. 579.
Union Pac. R. R. Co. vs. Peniston, 18 Wall. 5.

These cases fall rather within that portion of the decision of McCulloh vs. Maryland, and the line of cases following it, which holds that the specific property of the Federal agent was not exempt from taxation, though the "agent" itself was.

McCulloh vs. Maryland, 4 Wheaton, at page 436.
Osborn vs. Bank, 9 Wheaton, 867.

In the "Railroad Cases" referred to, the corporations were the Federal Agents, and it was held that they and their franchises and operations were exempt from taxation, though their property was not. In this case, the corporation makes no claim to be itself a "Federal Agent," and consequently exempt from taxation, but, we maintain, the land is such an agency, and it is consequently exempt. In other words, the plaintiff in error appears in this case not to protect itself, but this land, from taxation by the State of Maryland, on the ground that the land, not the corporation, is a Federal Agency, and of necessity exempt from State taxation.

VII.

THE TRACT OF LAND, OF WHICH THE LAND IN QUESTION IS A PART, WAS ACQUIRED BY THE UNITED STATES FROM THE OWNERS OF THE SOIL, WITH THE EXPRESS AND UNCONDITIONAL CONSENT OF THE STATE OF MARYLAND. CONSEQUENTLY, CONGRESS IS VESTED WITH EXCLUSIVE LEGISLATIVE JURISDICTION OVER IT, AND THE STATE OF MARYLAND HAS NO LEGISLATIVE OR OTHER POWER OVER IT, EXCEPT AS EXPRESSLY PERMITTED BY CONGRESS.

In our statement of the facts we have already called it to the Court's attention, that the whole Fort McHenry tract was acquired from the owners of the soil with the consent of the Legislature of Maryland, contained in the Joint Resolution adopted at its November Session, 1793. (Record, pages 18 and 19.)

The acquisition of the land in this manner for a public purpose is tantamount to a cession of the lands to the United States, and by virtue of the provisions of article 1, section 8, clause 17, of the Constitution, immediately upon such cession all authority of the State over the land is absolutely terminated, and it becomes subject only to the jurisdiction of Congress.

The decisions which hold that a State would have no right independently of a reservation of power in the act of cession, to try a person accused of a crime committed within the boundaries of such a tract so acquired, show to

how great a length the effect of such a cession has been held to reach.

U. S. vs. Cornell, 2 Mason, 60.
Commonwealth vs. Glary, 8 Mass. 72.
Fort Leavenworth R. R. Co. vs. Lowe, 114 U. S. 525.
R. R. Co. vs. McGlenn, 114 U. S. 542.
Bannon vs. Burns, 30 Fed. Rep. 892.
Martin vs. House, 39 Fed. Rep. 694.

Though, where the State's consent has been given upon condition, and in certain cases falling under Acts of Congress, conferring special jurisdiction on the states, a limitation of the rule has been permitted.

See—Act of March 5, 1795, Rev. Stats., sec. 4662.
Act of March 5, 1903, 32 Stat. at Large, 1220.

But on the contrary, by section 5371 of the Revised Statutes, it is expressly provided that the same acts, committed on a tract of land, held by the United States under cession, shall be crimes of the same degree and character against the United States, as they would have been against the State, if such land had never been ceded, and the pains and penalties of the State laws are adopted and imposed—as, however, the respective punishments inflicted by the United States—not by the State.

In this case, however, the consent of the Legislature of Maryland was given without conditions or restrictions, and the whole Fort McHenry tract from the date of its acquisition onward has been under the exclusive jurisdiction of the United States, and the State of Maryland has no power over the lands at all, legislative or otherwise.

It is needless to say that there is no Act of Congress conferring power upon the State to tax private or other property within such an area, to exercise the right of eminent domain, or other like sovereign power—

C. P. Chauvenet vs. County Commissioners, 3 Md. 259,

though it was held in the case of the Fort Leavenworth R. R. Co. vs. Lowe, *supra*, that when the State had expressly reserved the right to tax private property, within the ceded territory, such a reservation was valid.

It must therefore be concluded that in this case the State of Maryland has no power to tax the land, or any interest in it, or to exercise any other kind of jurisdiction over it, so long as the United States retains its exclusive power and jurisdiction over it. This exclusive jurisdiction would necessarily continue as long as such lands are being put to a public use, and would undoubtedly terminate, if they were in terms ceded back to the State by Congress. We also believe, that if Congress were, by gift or sale, to grant all the interest of the United States in them to private parties, without restriction or encumbrance, then, by reason of the fact that they were no longer being put to the purpose of their acquisition, *i. e.*, some public use, there would be held to be a recession by necessary implication, and all the jurisdiction of the State and its powers of legislation, and otherwise, over the ceded territory would revive. But in order to accomplish such a result, we submit, the suppositious private grant of the land by Congress must be absolute and unrestricted, and the Government must part with all its interest in it.

If a different rule were applied in this case, for instance, and if it be contended that the land here is subject under the present grant to the legislative power and other jurisdiction of the State of Maryland, because it is in the possession of the plaintiff of error, then it would necessarily follow that the exclusive power and jurisdiction of Congress conferred by the Constitution over lands acquired in such manner as this, could rise and fall, could divest and revest, upon an implication of law, without any express act of the United States or the State, in which they lie, which according to our view, is utterly impossible.

Consequently, we maintain, when land has once been ceded to the United States by a state, and its exclusive jurisdiction

over it called into being, that cession and exclusive jurisdiction can not be held to have terminated, so long as the United States have any interest, right or estate in the land, so ceded, certainly not while the United States is vested with a right of reverter, coupled with a beneficial right of present user, as in this case. If we be right in this, it follows that the State of Maryland has no jurisdiction or power whatsoever over the land in question, and, *a fortiori*, no power to assess and tax the land, or any estate in it, or to otherwise appropriate it or any part of it to the public uses of the State, and the assessment is void for this reason.

VIII.

In conclusion, we beg to call to the Court's attention the fact that although 23 years had elapsed, 1879 to 1902, between the grant in this case and the notice of the proposed assessment, now complained of, no effort had in all that time been made to tax the land, or the estate of the plaintiff in error in it, and, as the Court of Appeals recognizes in the case of Baltimore vs. Johnston, 96 Md. at page 746, such a lapse of time, acquiesced in by the State officers, though it may not be controlling, is none the less to be given full weight in determining whether any given property is subject to taxation, and should, we submit, put on the State the burden of proving it not to be exempt, as its sworn officers had for so long a period treated it.

For the errors, contained in the final judgment of the Court of Appeals of Maryland, the Court of last resort of that State, set forth in the assignment of errors, and contended for in this argument, we respectfully submit that the assessment complained of must be held void, and the judgment of the Court of Appeals of Maryland reversed.

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